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Nos. 78-186 and 78-314

In the Supreme Court of the United States

OCTOBER TERM, 1978

JACQUELINE RICH, PETITIONER

v.

UNITED STATES OF AMERICA

LLOYD M. PELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 578 F.2d 701.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1978. Petitions for rehearing were denied on July 3, 1978 (No. 78-186) and July 24, 1978 (No. 78-314). The petition for a writ of certiorari in No. 78-186 was filed on August 2, 1978, and the petition in No. 78-314 was filed on August 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a motion for continuance should have been granted to petitioner Rich.

2. Whether a pretrial motion for discovery of recorded telephone conversations of petitioner Rich was properly denied.

3. Whether the government precluded petitioner Rich from interviewing its witnesses.

4. Whether the grand jury testimony of Kathleen Waggoner should have been made available to petitioner Rich for use as evidence at trial.

5. Whether the Mann Act, 18 U.S.C. 2421 and 2422, is constitutional.

6. Whether, in the circumstances of this case, petitioner Pelton waived his right to assert a severance claim, and whether his trial with petitioner Rich denied him a fair trial.

STATEMENT

Petitioners and Ann Frazier were charged in an eight count indictment returned in the United States

District Court for the Eastern District of Missouri with various offenses growing out of a prostitution business in St. Louis. Counts I through IV charged petitioner Rich and Frazier with violating the Mann Act, 18 U.S.C. 2421 and 18 U.S.C. 2422, by conspiracy to transport and transporting three women to Chicago between September 29, 1976 and October 2, 1976. Counts V through VIII charged both petitioners with Mann Act violations involving three women transported to Nevada between October 7, 1976 and October 15, 1976. Following a jury trial, petitioner Rich was found guilty on seven counts and petitioner Pelton was found guilty on two counts.[1] Petitioner Rich was sentenced to concurrent terms of five years' each on counts I through IV. She was sentenced to concurrent terms of five years' each on counts V, VI, and VII to be served consecutively to the sentences for counts I through IV, for a total of ten years' imprisonment. Petitioner Pelton was sentenced to three years' imprisonment on each count, the terms to be served concurrently. The court of appeals affirmed (Pet. App. A19).

The evidence at trial showed that Fred Coughlin, a local businessman, telephoned petitioner Rich in late September, 1976, and asked to have two prostitutes go with him to a boat show to be held in Chicago in early October (Tr. 72). She agreed to send two of the women she employed. Coughlin subsequently picked up two women, Kathy Bray and

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[1] Frazier pleaded guilty in Chicago under the provisions of Fed. R. Crim. P. 20.

Charlotte Anderson, at Rich's home in St. Louis and drove them to Chicago (Tr. 72-76). Petitioner Rich also made independent arrangements to sent a third woman, Kathleen Waggoner, to Chicago to work as a prostitute (Tr. 105-108).

Kathy Bray become ill while in Chicago and returned earlier than expected to St. Louis (Tr. 109). Upon returning, Bray met with petitioners Rich and Pelton at Rich's home (Tr. 111-112). Plans were then made to send Bray and another woman to Winnemucca, Nevada for purposes of prostitution (Tr. 110-117). Petitioner Pelton called Penny's Cozy Corner, a house of prostitution in Winnemucca, and arranged for the women to work there (Tr. 113-117). Similar arrangements were made with respect to Shirley Dawson (Tr. 120). Pelton was to receive $200 per girl for his part in their placement (Tr. 114). Bray and Dawson subsequently traveled by airplane to Nevada pursuant to the arrangements made by petitioners (Tr. 117, 189).

ARGUMENT

1. The court below properly concluded that the trial court's denial of petitioner Rich's motion for continuance did not constitute an abuse of discretion (Pet. 14-19).

Petitioner Pelton was arraigned on July 11, 1978 and the district court set an August 1 trial date (Tr. 2). When petitioner Rich was arraigned on July 18, 1978, seven days after her arrest, defense counsel requested a change in the trial date to August 15 or August 22 because counsel was moving his office as of August 1 (Tr. 3-4). The trial judge denied this request and on July 28, Rich filed a motion for a continuance.[2] When the case was called for trial on August 1, counsel for Rich again urged that a continuance should be granted, asserting that personal problems involved in relocating his office impeded his trial preparation (S. Tr. 15-16) and that he desired to interview codefendant Ann Frazier in Chicago to determine her availability as a witness (S. Tr. 15-17).[3] At this point, government counsel expressed opposition to the granting of a continuance, pointing out that two witnesses were already in protective custody and expressing fear that delay of the trial could lead to the unavailability of witnesses. The court then denied the motion and the trial commenced (S. Tr. 18-20).

There was no abuse of discretion here. While petitioner based her motion primarily on counsel's personal exigencies, the government presented specific reasons against the motion, reasons going to the very heart of the prosecution. To be sure, counsel also stated that he needed more time for investigation, but he specifically called the court's attention only to the possibility of using codefendant Frazier as

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[2] Pelton filed a motion for a continuance on July 27.

[3] Defense counsel had spoken to the public defender who represented Frazier in Chicago. Counsel also said that the case involved investigation in Nevada and research of Nevada law which he had not been able to complete (S. Tr. 15-16). "S. Tr." refers to the "Supplementary Transcript" of the pretrial proceedings on August 1, 1977.

a witness. Significantly, he did not say that her defense counsel, whom he had contacted, had ever indicated that she would be available either as a witness or for an interview. In these circumstances, the court below properly concluded that petitioner supported her motion "with the speculation that there might be witnesses in Chicago and Nevada." Further, as the court of appeals noted, Rich was vigorously defended at trial (Pet. App. A-5). Given these factors, the trial court's refusal to grant a continuance was proper.[4] See *Ungar* v. *Sarafite*, 376 U.S. 575 (1964); *United States* v. *Uptain*, 531 F.2d 1281 (5th Cir. 1976).

2. Contrary to petitioner Rich's contention, the district court did not err in refusing to grant her pretrial request under Rule 16, Fed. R. Crim. P., for discovery of recordings of her voice which were in the possession of the government.

Rule 16(a)(1)(A) provides in part that, at the request of the defendant, the government shall permit the defendant to inspect and copy any relevant recorded statements made by the defendant within the possession of the government. But Rule 16(d)(1) provides that the court may deny such discovery upon a sufficient showing, including an *ex parte* showing. Before trial, petitioner made a request under Rule 16 for tape recordings of her voice in the possession of the government and moved to suppress the fruits of electronic surveillance. At argument on the pretrial motions, the government stated that all of its recordings of petitioner Rich were taken by cooperating individuals, rather than by government agents, that it did not intend to use such material in its case in chief and that it requested a Rule 16(d)(1) protective order restricting the discovery of such material "until such time as the government witness takes the stand and actually testifies about the occurrence" (S.Tr. 9-10). On behalf of Rich, her attorney addressed himself to the issue of electronic surveillance and pointed out that the government had advised him that it had recordings of his client's voice that it had permitted the court to hear. He argued that these recordings were statements of the defendant subject to discovery under Rule 16 as electronic surveillance material.

Finding nothing exculpatory in the material and invoking Rule 16(d)(1), the court ruled that the tape recordings should be sealed and made a part of the record (S. Tr. 10-11). On appeal, the government in its brief advised the court of appeals and petitioner Rich that the tape recordings of her voice, its electronic surveillance material, consisted of "voluntary interceptions by one of the parties" and showed "repeated attempts by the defendant Rich to stop potential witnesses from testifying or providing information". Brief for the United States, pp. 13-14, 7. The court below, in reviewing the record, examined the sealed tape recordings of petitioner Rich's voice and,

[4] Petitioner asserts that a conflict exists between the court of appeals decision in this case and decisions of other courts of appeals (Pet. 17-19). The cases cited by petitioner, however, do not reveal any conflict in the standard applied, but reflect fact patterns dissimilar from this case. See, *e.g.*, *Gavino* v. *MacMahon*, 499 F.2d 1191 (2d Cir. 1974), where the government was willing to consent to a continuance.

finding that Rich had not been prejudiced by being denied access to the tapes, upheld the protective order under Rule 16(d)(1).

This decision was correct. Petitioner Rich was properly denied access to this material both as an aid to her defense on the merits and as an aid to a suppression motion. This is not a case such as *Alderman* v. *United States*, 394 U.S. 165 (1969), where there were substantial grounds for supposing that the government's case might have been tainted by an illegal electronic surveillance by government agents, and there was therefore a need for the defendant to see the materials.[5] Here, on the contrary, as petitioner was told before trial, her voice was recorded by cooperating individuals and not by government agents, and, of course, recordings made by one party to a communication or with the prior consent of one such party are legal. *United States* v. *White*, 401 U.S. 745 (1971); 18 U.S.C. 2511(2)(d). In addition, it is in any event difficult to see how recordings made while petitioner Rich was trying to influence prospective government witnesses could have tainted the government's case.[6]

It follows that petitioner Rich's Rule 16 claim must stand or fall on the separate allegation that she was

[5] See also *Taglianetti* v. *United States*, 394 U.S. 316 (1969); *United States* v. *Martinez*, 428 F.2d 86 (6th Cir.), cert. denied, 400 U.S. 881 (1970).

[6] Petitioner says that unindicted co-conspirator Etta Williams "was obviously the government's source of information leading to the indictment" (Pet. 22).

improperly denied discovery of material that would have aided her defense at trial. While, ordinarily, a criminal defendant is entitled to access to her statements, Rule 16(d)(1) allows the court to deny or restrict such discovery. Where the materials involve, as here, attempts by a defendant to influence witnesses, there is a valid ground for denying discovery to protect the identity of persons cooperating with the government.[7]

Such discovery decisions are committed to the sound discretion of the trial court and are reversible only upon a showing that the error was prejudicial to the defendant's substantive rights. *United States* v. *Eddy*, 549 F.2d 108 (9th Cir. 1976); *United States v. Crow Dog*, 532 F.2d 1182 (8th Cir. 1976), cert. denied, 430 U.S. 929 (1977). Here, the trial judge, having heard the recordings, concluded that they contained no exculpatory material helpful to the defense. There is no basis for suggesting that discretion was abused.

3. Petitioner Rich also contends (Pet. 22-25) that the district court erred in denying her pretrial motion "to make witnesses and statements available."

Insofar as petitioner Rich is urging an inability to interview Charlotte Anderson, Kathleen Waggoner, Kathy Bray and Shirley Dawson, women alleged to have been transported for immoral purposes, the short answer to this complaint is that she should have ad-

[7] Indeed, the Advisory Committee Note to the 1974 Amendment to Rule 16 make it clear that in such circumstances discovery may be withheld consistently with *Alderman* v. *United States*, *supra*.

vised the trial court that she wanted to interview these women and had been unable to do so. Her motion identified only Etta Williams, an unindicted co-conspirator, and, in oral argument before the district court she only noted an interest in interviewing Ann Frazier, a codefendant. As to the latter, Rich's counsel talked to her attorney and should have asked him if she would have been available for an interview. As to Etta Williams, we rely on the answer of the court below. Williams, who petitioner states was the initial source of information in this case, was not used as a government witness and it was sufficient that she was made available for an interview during the trial. In sum, there is nothing in the record that indicates that the government impeded Rich's investigation. While the government had undertaken to protect two witnesses, this was a result of the witnesses' fears and not of any desire by the government to conceal evidence (S. Tr. 18-21; Tr. 173).

4. One count of the indictment charged Rich with transporting Kathleen Waggoner to Chicago. Pursuant to a grant of immunity, Waggoner testified before the grand jury and denied that Rich sent her to Chicago (Tr. 218-225). Waggoner was subsequently indicted for perjury as a result of this testimony (Tr. 219). Petitioner Rich contends (78-186 Pet. 25-30) that she should have been allowed to introduce portions of the grand jury testimony of Waggoner, pursuant to the unavailable witness provision of Rule 804 of the Fed. R. Evid. (Tr. 219). She

also argues that the government breached its duty under *Brady* v. *Maryland*, 373 U.S. 83 (1963), in refusing to grant her access to the grand jury testimony of Waggoner. The related contentions made here were rejected by the court below, on whose opinion we essentially rely.

The grand jury testimony was not admissible under Fed. R. Evid. 804 which governs the admissibility of out of court statements of unavailable witnesses. Section (a)(1) of the Rule, relied on by petitioner (Tr. 220), defines a witness as "unavailable" if he "is exempted *by ruling of the court* on the ground of privilege from testifying concerning the subject matter of his statement" (emphasis added). The proponent of the evidence has the burden of proving the unavailability of the declarant. *United States* v. *Amaya*, 533 F.2d 188 (5th Cir. 1976), cert. denied, 429 U.S. 1101 (1977). However, in this case, the sole indication that Waggoner was unavailable was an unsworn assertion by petitioner's counsel that Waggoner's attorney would advise her to refuse to testify (Tr. 218). As the court of appeals noted (Pet. App. A-12), such speculation constituted a wholly inadequate showing of unavailabiltiy as required by Rule 804(a)(1). The grand jury testimony was therefore properly ruled inadmissible by the trial court.

Nor was there a violation of *Brady* v. *Maryland*, *supra*. The purpose of the *Brady* rule is to assure that a defendant "will not be denied access to exculpatory evidence known to the government but *un-*

known to him." United States v. *Ruggiero*, 472 F.2d 599, 604 (2d Cir.), cert. denied, 412 U.S. 939 (1973) (emphasis added). It is clear from the record that petitioner was aware of the essential contents of Waggoner's statement. In fact, Waggoner's testimony that Rich did not send her to Chicago was quoted in her perjury indictment and hence was a matter of public record (Tr. 221-222, 226). There was therefore no *Brady* violation on the part of the government.

5. Petitioner Rich contends that the Mann Act is unconstitutional in that it prohibits travel to engage in lawful acts since prostitution is legal in Nevada (Pet. 30-32).

Petitioner lacks standing to attack the statute on this ground. Petitioner herself was not accused of travelling in violation of the Act. Nor does petitioner claim to be a prostitute whose right to travel to Nevada to engage in legal acts of prostitution has been violated. As a general rule, a claimant may not raise the constitutional rights of third parties as a defense. See, *e.g.*, *United States* v. *Raines*, 362 U.S. 17 (1960); *Tileston* v. *Ullman*, 318 U.S. 44 (1943). Petitioner therefore lacks standing to attack the constitutionality of this statute. See *United States* v. *Garrett*, 521 F.2d 444 (8th Cir. 1975).

In any event, Congress may prohibit the transportation of women in interstate commerce for immoral purposes under the commerce clause of the Constitution. As this Court said in *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917):

> The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

See also *Hoke* v. *United States*, 227 U.S. 308 (1913); *United States* v. *Garrett*, *supra*. The fact that some counties in Nevada regulate, rather than prohibit, prostitution cannot affect the validity of the Mann Act, or create a special exemption for transportation of women to those localities. While Congress could fashion an exception for such circumstances if it so chose, the power of Congress over interstate commerce is not limited by such state laws. *United States* v. *Hill*, 248 U.S. 420, 425 (1919).[8]

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[8] Petitioner also contends that the evidence was insufficient to establish inducement as required under 18 U.S.C. 2422 and to establish *mens rea* (Pet. 31-32). Both claims are without merit. The inducement element is satisfied by "any offer sufficient to cause the woman to respond," *Harms* v. *United States*, 272 F.2d 478, 481 (4th Cir. 1959), which is clearly presented by the evidence at trial which showed that petitioner Rich helped arrange the trip to Nevada and supplied Bray and Dawson with money for clothes and air fare (Tr. 114-117, 182-188). Bray testified that "Pat [Rich] and Big Lloyd [Pelton] sent me to Nevada" (Tr. 124). The *mens rea* required is only the "intent that the female transported by the accused in interstate commerce shall, after such transportation, engage in the charged immoral conduct." *Baker* v. *United States*, 310 F.2d 924, 931 (9th Cir. 1962). Again, as is clear from the record, the arrangements made by petitioners involved sending Bray and Dawson to Nevada to work as prostitutes (Tr. 114-117, 168, 182-188).

6. Petitioner Pelton's sole contention is that his failure to renew his pretrial motion for severance at the close of the government's case or at the conclusion of all the evidence did not, as the court below held, constitute a waiver of his right to assert the severance issue. We submit that, in the circumstances of this case, this Court should not review this issue.

Fed. R. Crim. P. 8(b), which governs joinder of defendants in multiple count indictments, provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Four counts of the indictment charged petitioner Rich and Ann Frazier with offenses arising out of the transportation of three women to Chicago between September 29, 1976 and October 2, 1976. The other four counts charged Rich and petitioner Pelton with offenses arising out of the transportation to Nevada between October 7, 1976 and October 15, 1976, of three women, including two of the women alleged to have been transported in the first four counts. The two sets of counts were therefore properly joined as part of the same series of transactions, and we do not understand that petitioner Pelton contends otherwise.

Nor was severance needed to avoid a prejudicial joinder of petitioner Pelton under Rule 14, Fed. R.

Crim. P. Although the Chicago and Nevada trips were two separate excursions, they were both part of the same overall operation. The prostitutes worked for the same madam out of the same house (Tr. 104-108, 182). The trips were arranged within two weeks of each other and the arrangements were made at the same location (Tr. 72-73, 91, 111). One of the women was sent to both locations and she was the government's chief witness as to both trips. Even if Pelton had been tried alone, it would have been evident that Rich and the women that were transported had been previously involved in prostitution activities. The case was not complex and Pelton's role, making arrangements for the Nevada trip, was simple. It was sufficient that the jury was cautioned on two separate occasions to keep the evidence as to the two different defendants separate (Tr. 9, 295-296).

We recognize that the courts of appeals have not been consistent on whether a motion for relief from prejudicial joinder is required. Compare *United States* v. *Porter*, 441 F.2d 1204, 1212 (8th Cir.), cert. denied, 404 U.S. 911 (1971), and *United States* v. *Figueroa-Paz*, 468 F.2d 1055 (9th Cir. 1972), with *United States* v. *Gougis*, 374 F.2d 758 (7th Cir. 1967), and *United States* v. *Mardian*, 546 F.2d 973, 979 (D.C. Cir. 1976). See also 1 C. Wright, *Federal Practice and Procedure* § 221, at 432-435 (1969). We submit that these differences need not be resolved in a case such as this where, as we have shown, there was no prejudice. We are content to rely on the rule announced in *Schaffer* v. *United States*, 362 U.S. 511,

516 (1960), to the effect that there is a "continuing duty at all stages of the trial to grant a severance if prejudice does appear." But, here, as there, petitioners "failed to show any prejudice that would call Rule 14 into operation."

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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